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No. 88-1905

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

EDDIE KELLER, *et al.*,

Petitioners,

v.

STATE BAR OF CALIFORNIA, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND THE ATTORNEY GENERAL OF NEW MEXICO IN SUPPORT OF PETITIONERS

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MOTION OF THE WASHINGTON LEGAL FOUNDATION AND THE ATTORNEY GENERAL OF NEW MEXICO FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The Washington Legal Foundation (WLF) and the Attorney General of the State of New Mexico hereby move, pursuant to Supreme Court Rule 36, for leave to file the annexed brief *amici curiae* in support of the petitioners in the above captioned proceeding. Consent to filing of this brief was granted by the petitioners but denied by respondents, thus necessitating the filing of this motion.

INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 120,000 members and supporters nationwide. Many WLF members and supporters are attorneys living in states, including California, with integrated bar associations and they will be directly affected by this case. In addition, WLF engages in litigation in a variety of areas. WLF devotes a substantial amount of its resources to promoting free speech rights. WLF has appeared in a number of cases involving free speech issues including *Meyer v. Grant* ___ U.S. ___, 108 S.Ct. 1886 (1988); *Peel v. Attorney Registration and Disciplinary Commission of Illinois* (Docket # 88-1755); and *Austin v. Michigan State Chamber of Commerce* (Docket #88-1569). In addition, WLF has been active in other issues involving state regulation of legal practice and has participated in the current debate in New York State over whether the Chief Judge of that state should impose a mandatory pro bono requirement as a condition of practicing law.

The Attorney General of New Mexico is the chief law enforcement official of that state. As such, he is concerned with any continuing violation of constitutional rights of citizens of New Mexico -- including lawyers. New Mexico attorneys are not required to support the political and ideological agenda of the new Mexico Bar as a result of the ruling in *Arrow v. Dow*, 544 F.Supp. 458 (D.N.M. 1982). If the California Supreme Court's decision in *Keller v. State Bar*, 767 P.2d 1929 (1989), is upheld, the New Mexico State Bar may attempt to once again force New Mexico attorneys to support political and ideological activities.

Accordingly, *amici* wish to participate in this case and to bring to this Court's attention the impact of this case beyond California and additional arguments as to why the lower court decision should be reversed.

Respectfully submitted,

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND THE ATTORNEY GENERAL OF NEW MEXICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* are set forth in the preceding motion and are adopted herein.

STATEMENT OF THE CASE

The California State Bar is an integrated bar, which means that as a condition of practicing law in California, attorneys are required to join and pay dues to the State Bar.[1] The State Bar derives its authority to compel membership and financial support from attorneys pursuant to the State Bar Act (Cal. Bus. & Prof. Code § 6000 *et seq.*).

In 1982, the California State Bar took positions on a number of political and ideological issues such as comparable worth, polygraph tests, possession of armor piercing ammunition, air pollution regulation, sex discrimination, prison construction, a crime victims' bill of rights, the Equal Rights Amendment, and gun control. In support of those positions, the California State Bar spent members' dues to pass resolutions, lobbied the state legislature, and filed *amicus* briefs in court.

In 1982, Keller and 20 additional attorneys, who were licensed to practice law in California and compelled to join and financially support the California State Bar, filed a complaint in the Superior Court of Sacramento seeking a declaration that the State Bar's advancement of a political and ideological agenda with compelled dues violated the objecting attorneys' First Amendment rights.

The trial court granted a motion for summary judgment in favor of the State Bar ruling that the Bar was like a government agency. The court held that as a

[1] The problem of compelled bar membership is not limited to California. As of 1982, 32 states had integrated bar associations. Sorenson, *The Integrated Bar and the Freedom of Nonassociation -- Continuing Siege*, 63 Neb. L.Rev. 30, 35 (1983).

government agency, the State Bar was expressing its own views and therefore was not impermissibly compelling the "members" of the agency to support the speech interests of the State Bar. The trial court therefore concluded that the State Bar was not restricted by the First Amendment.

The California Court of Appeals for the Third Appellate District reversed the judgment of the trial court and ruled that the State Bar was both a private and governmental organization. The appellate court held that while the Bar could use compelled dues to finance its governmental functions (admission to the practice of law and attorney discipline), the Bar could not use compelled dues to support its private activities (such as political and ideological activities).

The Supreme Court of California ruled, as did the trial court, that the State Bar was analogous to a government agency and as a government agency it was ment limitations on speech and association. Hence, the

California Supreme Court ruled that the government could compel attorneys to financially support the political and ideological activities of the State Bar.

SUMMARY OF THE ARGUMENT

The First Amendment to the Constitution protects the right to free speech as well as the right to refrain from compelled speech. It also protects the right to practice law. Integrated bar associations impact upon the First Amendment rights of attorneys by compelling them, as a condition of practicing law, to join bar associations and to pay dues which are used to finance the speech interests of the state bar. The California State Bar is an integrated bar that is essentially the

same as the other integrated bars around the country, including the Wisconsin Bar which was before this Court in *Lathrop v. Donohue*, 367 U.S. 820 (1961).

The California Supreme Court attempted to distinguish the State Bar of California from other integrated bars by painting the State Bar as the equivalent of a state agency. The California Court reasoned that as the equivalent of a state agency, the State Bar could express its own views just as any other state agency can speak. Furthermore, the court argued that the dues of members were more like a tax and the State Bar members could not challenge the use of "tax" money by the state.

The California State Bar is *not*, despite the ruling of the California Supreme Court, the equivalent of a state agency. The California State Bar, while it has some attributes of a government agency, is easily distinguishable from a state agency because it, unlike other state agencies, is composed of "members" and is financed by "dues" rather than by taxes.

The California State Bar, like other integrated state bar associations around the country, is a hybrid organization. State bar associations are primarily private organizations that have the power to compel membership. That power to compel membership is the state action which triggers the First Amendment.

Even if the California State Bar were a state agency, its peculiar status would still require that it be subjected to First Amendment analysis. A state cannot require that individuals support a political or ideological agenda of a state agency as a condition of practicing law, medicine, or any other occupation.

This Court has made the analogy between compulsory support of a labor union and compulsory support of an integrated state bar association in the past. The cases dealing with compulsory agency fees in the public sector and under the Railway Labor Act (45 U.S.C. §§ 151 to 188) provide the proper model for analyzing the constitutionality of the California State Bar's impact upon the First Amendment rights of attorneys.

The petitioners in this case objected to the compulsory support of the political and ideological agenda of the California State Bar. Political and ideological activities are a core speech area of the First Amendment. The State of California has no interest which justifies the infringement upon objecting attorneys' First Amendment rights by compelling those attorneys to financially support the State Bar's advocacy of political or ideological causes. Unlike the situation faced by this Court in *Lathrop*, there is a sufficient record for this Court to rule that attorneys cannot be required to pay for those activities as a condition of practicing law.

Those are not, however, the only areas of integrated state bar activity that potentially infringe upon First Amendment rights. There are many other activities in which integrated bars around the country engage that may also impact upon First Amendment rights of objecting attorneys. While the Court does not have a record before it to do the line-drawing with respect to those activities, it should set the standards for testing the constitutionality of compelled financial support of a state bar in such a manner that the lower courts can have adequate guidance to make those line drawing decisions in the future.

Using the compelled union dues model, this court should hold that dissenting attorneys cannot be com-

pelled to pay for *any* activities unless the state has a compelling interest that justifies the infringement on the objecting attorneys' First Amendment rights. Even if there is a compelling state interest, the government should only be permitted to coerce payment to subsidize those activities if that is the government's least restrictive means of achieving that state interest.

ARGUMENT

I. THE STATE BAR OF CALIFORNIA IS RESTRICTED IN THE MANNER IN WHICH IT CAN USE THE BAR DUES OF OBJECTING ATTORNEYS.

A. The cases dealing with government compelled membership in labor unions provide the model for analyzing this case.

The State Bar of California is an integrated bar. *Saleeby v. State Bar*, 702 P.2d 525, 529 (Cal. 1985). An integrated bar, or unified bar, is an organization to which all attorneys must join and pay dues as a condition of practicing law in the state. *In Re Unification of New Hampshire Bar*, 248 A.2d 709, 711 (N.H. 1968). Integrated state bars are hybrid organizations that have functions that are sometimes performed by the government and other times are more typical of a private organization. Attorney discipline and licensing of attorneys are examples of regulatory functions of many integrated bars that are often performed by the government. *Schneider v. Colegio de Abogados de Puerto Rico*, 682 F.Supp. 674, 685, n.10 (D.P.R. 1988). Integrated bars often also engage in activities such as pre-paid legal services, lawyer referral services, and lawyer placement services that are non-regulatory or non-governmental in nature. *Falk v. State Bar of*

Michigan, 305 N.W.2d 201 (Mich. 1981) [*Falk I*]. Membership in an organization is an example of a facet of an integrated bar that is traditionally associated with a private organization. Finally, many integrated state bar associations engage in political and ideological activities.

The California State Bar engages in diverse activities ranging from the regulation of the admission and discipline of attorneys to lobbying the legislature and filing of *amicus* briefs.[2]

Integrated state bars may vary in detail from state to state, but the essential element that distinguishes a voluntary bar from an integrated bar is that the members of the integrated bar are compelled by the government to join in order to practice law. *Petition of Chapman*, 509 A.2d 753, 756 (N.H. 1986). Sometimes the compulsion is the result of legislative action such as in California, Cal. Bus. & Prof. Code § 6000 *et seq.*, and Puerto Rico 43, 4 L.P.R.A. § 771 *et seq.* It also can be the result of a judicial order as in New Mexico, S.C.R.A. 1986 24-101 (1989 Repl. Pamph.). At other times the compulsion is the result of both statute and a court order as in Michigan 1935 P.A. 58, and Section 1 of the Michigan Supreme Court Rules concerning the State Bar.

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[2] It is ironic that the California State Bar filed an amicus brief, in the last term of this Court, in the case of *Mallard v. United States District Court for the Southern District of Iowa*, ___ U.S. ___, 109 S.Ct. 1814 (1989). In that brief, the State Bar argued that to require attorneys to accept court ordered appointments to represent indigent individuals on a pro bono basis would be a taking of property in violation of the Fifth Amendment to the United States Constitution. Yet, the Bar fails to recognize that the taking of attorneys' money to finance the Bar's own ideological agenda violates attorneys' First Amendment rights.

The exact source of the authority for compelled membership is irrelevant, as long as the source is the government. Compelled membership is the state action which triggers the protection of the First Amendment to the United States Constitution.

This Court analyzed the impact of compelled association and speech in the context of an integrated bar in *Lathrop*. The Court interpreted the Wisconsin State Bar membership as being limited to compelled financial support. *Lathrop*, 367 U.S. at 827-828, 843. This Court concluded that, to the extent bar membership was limited to financial support, the State of Wisconsin could compel membership in that state bar without impermissibly infringing upon the First Amendment rights of dissenting attorneys.

However, with respect to whether attorneys could be compelled to support the speech interests of the Wisconsin Bar, the Court was not able to reach a majority opinion. As this Court later pointed out in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 n.29 (1977), the only thing concerning compelled speech about which the majority agreed in *Lathrop* was that the constitutional issues should be decided. In the plurality opinion in *Lathrop*, Justice Brennan wrote that because the issue of the constitutionality of compelling financial support for speech activities was not concretely presented to the Court, the Court could not decide that issue.[3] This case presents the concrete record needed

[3] A majority of the Court did believe that the issue was ripe for adjudication in *Lathrop* however, there was no majority on the question of whether it was constitutional. Justices Harlan, Whittaker, and Frankfurter, in concurring opinions, did not see any constitutional problems. Justices Black and Douglas, in dissent, (continued...)

by this Court to decide the constitutionality of compelling objecting attorneys to subsidize the speech of integrated state bar associations.

How should integrated bar cases be analyzed? The Court should apply a First Amendment analysis to determine whether the impact of compelled bar dues can be justified. The cases dealing with compulsory fee payments to labor unions in the public sector and under the Railway Labor Act provide the model to analyze this case.

This court has recognized the similarities between integrated state bar associations and labor unions for purposes of First Amendment analysis on several occasions.[4] *Railway Employees Dept. v. Hanson*, 351 U.S. 225, 231 (1956); *Lathrop*, 367 U.S. at 842; *Abood*, 431 U.S. at 233 n.29.

Furthermore, nearly all of the lower courts -- except the trial court and the California Supreme Court in this case -- have used the labor union model to analyze the First Amendment implications of integrated bars. *Arrow v. Dow*, 544 F. Supp. 458 (D.N.M. 1982); *Falk v. State Bar of Michigan*, 305 N.W.2d 201 (Mich. 1981) [*Falk I*]; *Falk v. State Bar of Michigan*, 324 N.W.2d

[3](...continued)
held that compelled speech did violate the Constitution. The four member plurality opinion of Brennan held that the issue was not concretely presented so as to permit adjudication of the issue.

[4] At least one circuit has also recognized the utility of the public sector labor model for First Amendment analysis when analyzing the impact upon the First Amendment rights of students required to pay a fee to support an ideological organization as a requirement for attending a state supported university. *Galda v. Bloustein*, 772 F.2d 1060 (1985).

504 (Mich. 1983) [*Falk II*]; *Schneider v. Colegio de Abogados de Puerto Rico*, 682 F. Supp. 674 (D.P.R. 1988); *Petition of Chapman*, 509 A.2d 753 (N.H. 1986); *Gibson v. Florida Bar*, 798 F.2d 1564 (11th Cir. 1986); *Hollar v. Government of the Virgin Islands*, 857 F.2d 163 (3d Cir. 1988); *see Report of Committee to Review the State Bar*, 334 N.W.2d 544 (Wis. 1983); *but see Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988) (dealing only with the right of non-association and not with compelled speech aspect of an integrated bar).

With respect to compelled membership and financial support of a labor union, this Court has held that when an employee is compelled by the government to join a labor union as a condition of employment the First Amendment rights of the employees are implicated. *Abood*; *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

The principle underlying this Court's decisions in those labor union cases is that just as the First Amendment to the Constitution protects the right to freedom of speech and association, it also protects the right to refrain from compelled speech and association. *Abood* , 431 U.S. at 234-235; *Wooley v. Maynard*, 430 U.S. 705, 713-715 (1977); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

This Court has concluded that the use of state action to compel financial support of a labor union is a *significant* infringement upon the First Amendment rights of dissenting employees. *Ellis*, 466 U.S. at 455. The government may only require objecting employees to financially support a labor union if it has an interest which would justify the impact upon the First Amend-

ment rights of the employees. *Abood*, 431 U.S. at 232-233. *Ellis*, 466 U.S. at 455-456.

The similarities between the coerced support for a labor union and the coerced support for a bar association are obvious.[5] The government, in both instances, compels membership in an organization as a condition of employment. Both are supported by compulsory dues. Both engage in speech activities and often that speech involves political and ideological topics. There is no real distinction between coerced union membership and bar membership for purposes of First Amendment analysis. There is nothing about the practice of law which permits the government to treat the First Amendment rights of lawyers differently from those of any other citizens. As one court stated, "the First Amendment does not distinguish between lawyers and other occupations." *Arrow*, 544 F. Supp. at 460.

Compelling attorneys to financially support the political and ideological agenda of the State Bar may also infringe upon the speech interests of the clients of those attorneys. Clients may be paying an attorney to represent them on issues that are diametrically opposed to the Bar's ideological agenda, yet the attorney is financing, through Bar dues, the opposite position.[6]

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[5] In addition, the same principles would apply to coerced support for other professional associations. Numerous states license a host of occupations ranging from doctors to beauticians. If the California Supreme Court decision is upheld, there is a genuine risk that some states might compel association and financial support for other membership organizations.

[6] A conflict between an attorney's financial support of the State Bar and the attorney's clients may also violate the spirit of the attorney's ethical obligation to avoid conflicts in the representation of his client -- especially if the Bar is filing amicus briefs or

(continued...)

When the labor union analogy is applied to this case, it is clear that the First and Fourteenth Amendment rights of objecting attorneys are significantly infringed upon when they are required to join and pay dues to a state bar association. Because there is an infringement, traditional First Amendment analysis should be applied to this case.

B. The California State Bar is not the equivalent of a state agency.

Although this Court and the lower courts have already recognized the similarities between compelled support for an integrated bar and the compelled support of a labor union for purposes of First Amendment analysis, the California Supreme Court has instead analyzed the California Bar as if it were a government agency.

The California Supreme Court attempted to distinguish the California State Bar from other integrated bars by arguing that the governmental involvement with the California Bar was more pervasive in California. It supported this claim by pointing out that the California State Bar is considered a public corporation, that six members of the Board of Governors are public appointees, that the legislature must approve the Bar's budget, and that the legislature limited the State Bar's political activity. The California Court held that because of that state control over the State Bar, the State Bar should be

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[6](...continued)
litigating in a case involving the client. California Rule of Professional Conduct 3-310.

analyzed as if it were a government agency rather than as a labor union.[7]

However, the California Bar is not the same as a state agency. The California Supreme Court repeatedly sets up the false dichotomy that the State Bar is either a private organization or a state agency. It failed to recognize that the California State Bar is a hybrid organization that contains elements of both.

The California State Bar is very similar to the Wisconsin Bar that was before this Court in *Lathrop*. Both bar associations engaged in a wide range of activity from attorney discipline to legislation. While the Wisconsin legislature did not approve the budget of the Wisconsin Bar as in California,[8] the Wisconsin government did limit the amount of dues which the bar could require members to pay. *Lathrop*, 367 U.S. at 828 n.5. In many ways, controlling the amount of the Bar's income is the equivalent of controlling the budget.

Also, while the Wisconsin State Bar did not have representatives on its governing board appointed by the

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[7] Even the California Court, at times, was reluctant to say that the California Bar is a state agency, but instead used terms such as: "the California State Bar is *analogous* to a government agency" *Keller v. State Bar* 767 P.2d 1929, 1027 (1989) (emphasis added); or, "the state bar should be governed by standards *applicable* to a state agency." *Id.* at 1033 (emphasis added); and "The California Bar is best described as *analogous* to a governmental agency." *Id.* 767 P.2d at 1029 (emphasis added).

[8] At least one other state also has governmental control over the budget of the state bar association. In New Mexico, the state bar association budget must be submitted to the Supreme Court of New Mexico. S.C.R.A. 1986 24-102 (1989 Repl. Pamph.).

government,[9] as does the State Bar of California, the Wisconsin Supreme Court through the promulgation of rules and regulations was the ultimate source of governance for the Wisconsin Bar.

Furthermore, the public representatives on the Board of the California Bar are a minority, so that fact should not change the nature of the Bar from a private organization to a government agency. As the California Supreme Court pointed out in an earlier case, the California Bar has a "large amount of self government." *Saleeby*, 702 P.2d at 529.

The California Supreme Court also stated that it was significant that the legislature limited the political activity of the bar. Again, that is essentially the same thing that the Wisconsin Supreme Court did when it ordered the integration of the Wisconsin State Bar and limited the Bar's legislative activities to those authorized by the rules and by-laws promulgated by the Wisconsin Supreme Court. The Wisconsin Supreme Court indicated it would use its inherent power to take remedial action should the Wisconsin Bar engage in unauthorized legislative activity. *Lathrop*, 367 U.S. at 845 n.17, 862.

In short, even with respect to those aspects of the California State Bar that the California Supreme Court considered significant for purposes of distinguishing the Bar, the California Bar is very similar to the Wisconsin Bar examined by this Court in *Lathrop*.

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[9] Since *Lathrop* Wisconsin has discussed having non-lawyer representatives appointed by the Court to the Board's governing body. *Report of the Committee to Review the Bar*, 334 N.W.2d 544 (Wis. 1983).

It is obvious that the California State Bar is not analogous to a state agency. If the California State Bar is a government agency, it does not resemble any other government agency. It would be the only governmental agency that had compelled "members" and would be the only agency financed through compulsory dues rather than tax dollars. Furthermore, since membership in the California Bar is not limited to California voters or even residents of the state, the State Bar would be the only government agency governed, at least in part, by citizens of other states.

That the Bar is financed with dues rather than with taxes is important. This Court, in *Regan v. Taxation with Representation*, 461 U.S. 540, 546 n.7 (1983), distinguished between Congressional subsidy of private speech activities with tax monies and limiting individual expenditures of money on First Amendment activities. By collecting compulsory dues from objecting attorneys to subsidize the State Bar's activities, it deprives attorneys of that money to use for their own speech activities. The only citizens of California that are required to financially support the State Bar are attorneys through the compulsory payments of dues. *Dues* of "members", not *taxes*, finance the political and ideological agenda of the California Bar.

The Washington Supreme Court, in *Young Americans for Freedom v. Gorton*, 588 P.2d 195 (Wash. 1978), was faced with the question as to whether the freedom of speech and association rights of the citizens of Washington State were being infringed upon by the filing of an *amicus curiae* brief by the Washington Attorney General in the United States Supreme Court. The plaintiffs in that case attempted to compare their compelled support of the State Attorney General with compelled support for a labor union. Rejecting that

claim, the Washington Supreme Court pointed out that the objectors in that case, "have not been compelled to join any group or organization. They have not been forced to associate with those whom they wish to avoid. *Their voluntary citizenship in a state cannot be equated with compelled membership in a club.*" *Id.* at 220-201 (emphasis added). So also, it is clear that the California State Bar is a compelled membership organization and *cannot* be equated with a State agency.

If the California Supreme Court's claim that the California State Bar is "different" from other state bars is correct, it is a difference without a distinction. The California Bar is essentially like other state bars, including the Wisconsin State Bar this Court examined in *Lathrop*. It is not a state agency, but is a hybrid organization limited by the First Amendment when it uses state action to compel membership.

C. Even if the State Bar of California is a state agency, it is still limited by the First Amendment in the manner in which it can use compelled fees.

Even if the State Bar in California is a state agency, that still does not give it carte blanche power to collect compulsory dues to engage in speech activities. The State Bar, like any other state agency, cannot infringe upon the First Amendment rights of attorneys without a compelling state interest that would justify that infringement.

It is well established that the government cannot make the exercise of a right or the receipt of a benefit conditional upon association with a particular ideology. For instance, the government cannot compel an individual to display a state motto on a license plate as a

condition of driving a car. *Wooley v. Maynard*, 430 U.S. 705 (1977). Nor can the state compel support of a political party as a condition of employment in a government job. *Elrod v. Burns*, 427 U.S. 347 (1976). Furthermore, the government cannot, absent a compelling state interest, deny a public benefit because an individual exercised a constitutional right. *Thomas v. Review Board of Indiana*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

First Amendment rights also extend to the right to practice law. Litigation is a form of speech and association that is protected by the First Amendment. *In Re Primus*, 436 U.S. 412, 428 (1978); *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 580 (1971); *NAACP v. Button*, 371 U.S. 415, 429, 431 (1963). This is true regardless of the type of litigation pursued. *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 3-4 (1964).

Just as the government cannot make an individual choose between the exercise of a right and receipt of a benefit, so also a state cannot condition practice of law upon giving up First Amendment rights. An individual cannot, absent a compelling state interest, be required to relinquish his First Amendment right to speak through advertising in order to practice law. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Nor can an attorney be denied a license to practice law because of the exercise of First Amendment rights. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

If an attorney objects to the speech activities of an integrated bar, compelling the attorney to support those activities would necessarily impact upon the attorney's freedom of speech. California cannot, absent a com-

pelling state interest, condition the practice of law upon the compelled financial support of the political and ideological agenda of the California State Bar.

Membership in the State Bar is required by California in order to practice law. By compelling attorneys to financially support the State Bar as a condition of employment, the government is forcing attorneys to choose between their First Amendment rights of freedom of speech and association and their right to practice law. Hence, even if the California State Bar is analogous to a state agency, it is still subject to the restrictions of the First Amendment.

II. THE TEST THIS COURT USES TO DETERMINE WHETHER THE FIRST AMENDMENT IS BEING VIOLATED IS WHETHER THERE IS AN IMPORTANT GOVERNMENTAL INTEREST WHICH JUSTIFIES THE INFRINGEMENT ON SPEECH AND ASSOCIATION.

As discussed above, the cases dealing with compelled union dues provide the model to analyze this case. If the labor union analogy is used, a classic First Amendment analysis must be applied. *Hudson*, 475 U.S. at 303 n.11.[10]

The first prong of the First Amendment analysis is whether there is a compelling state interest which justifies the infringement on the First Amendment right of non-association. *Abood*, 431 at 220-224; *Buckley v. Valeo*, 424 U.S. 1, 65 (1976); *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958).

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[10] Even if the State Bar is a state agency, the First Amendment analysis is the same.

If there is a state interest that justifies bringing the group together, the second prong is whether the infringement upon the speech interests are any greater than the initial infringement of compelled association. *Ellis*, 466 U.S. at 456 (1984).

Finally, if the infringement is justified by a compelling state interest, the final prong is whether the state has chosen the least restrictive means to implement the program so as to minimize the infringement upon First Amendment rights. *Hudson*, 475 U.S. at 303; *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973); *Elrod v. Burns*, 427 U.S. 347, 362-363 (1976).

A. There is no compelling state interest that justifies compelled membership in the State Bar of California.

Does the state of California have a state interest that justifies coerced membership in the State Bar? Even if an association didn't engage in any speech activities, an individual still might object to even joining the organization. *See Abood*, 431 U.S. at 257 (1977) (Powell, J., concurring). The California legislature has set forth a number of specific duties of the State Bar involving the legal profession such as regulation of the admission to practice law and attorney discipline. In addition, the State Bar is empowered by the State to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." *Keller*, 767 P.2d at 1024.

This Court, in *Lathrop*, held that similar state interests justified compelled association in the Wisconsin state bar. In *Lathrop*, however, this Court interpreted the forced association to be limited to financial support

of the bar. *Lathrop*, 367 U.S. at 827-828, 843. The California Supreme Court did not address, in the decision below, the extent of the forced association required by the California State Bar. It is unclear whether the membership in the California Bar is limited to financial support.

Even if the government has a compelling interest in forcing attorneys to financially support activities such as the regulation of attorney discipline and admissions, compelled membership is not required to carry out those functions. There is no interest that would justify compelled membership -- as opposed to financial support -- in a state bar. The State of California has not demonstrated any legitimate state interest which justifies anything other than -- at the most -- compelled financial support.[11]

B. California does not have an interest that justifies compelling financial support for the State Bar for political and ideological activities.

If the government has *any* legitimate interest in compelling support for an integrated state bar, it is limited to compelling financial support for activities such as the regulation of bar admissions and attorney discipline. However, in light of the fact that many states manage to perform the regulatory functions without an integrated state bar, it may be that even those performed by the California Bar no longer justify the impact upon First Amendment rights. Sorenson, *supra*

[11] In the context of labor relations, this Court has whittled down to its financial core the requirement of "membership" under the National Labor Relations Act. 29 U.S.C. § 151 *et seq.*; *N.L.R.B. v. General Motors Corporation* 373 U.S. 734, 742 (1963).

at 62. If regulation of attorney discipline and admissions are not compelling state interests it is unlikely that the California Bar can compel attorneys to support it for any activities.

Even if there is a compelling state interest that justifies compelled financial support for the regulatory functions of a state bar, this Court must examine whether there are additional infringements upon First Amendment rights beyond that which justify the compelled association for other purposes. *Ellis*, 466 U.S. at 456.

The petitioners in this case objected to having mandatory bar dues used to promote the political and ideological agenda of the State Bar of California. The attorneys specifically objected to the lobbying done by the State Bar, the resolutions passed on public policy issues by the State Bar, and the *amicus curiae* briefs filed by the State Bar. Political and ideological activity represent "the core of those activities protected by the First Amendment." *Elrod*, 427 U.S. at 356 (1976) (plurality opinion).

What state interest is there that can justify impacting upon the core of the First Amendment? As discussed above, the State of California has set forth a number of specific interests involving the regulation of the practice of law. While those limited interests may be sufficient state interests to justify some coerced financial support, they are unrelated to and do not justify the use of compulsory bar dues to support the political and ideological agenda of the State Bar.

The state interest which is used to justify compelled support for the California State Bar's political and ideological speech is the Bar's general goal to "aid in

all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." Cal. Bus. & Prof. Code § 6031 (a). The Bar's general counsel has described this provision as "the springboard of the State Bar activities." *Keller*, 767 P.2d at 1024.

Such a general purpose is too broad to withstand Constitutional scrutiny. All of society has an interest in the improvement in the administration of justice. There is no legitimate state interest which requires that the California State Bar have an "amplified voice" when speaking on such a broad topic.

The California State Bar has interpreted that claimed state interest in a manner that has permitted the Bar to lobby and comment upon a whole host of political issues (such as gun control, welfare reform, and comparable worth). There is no reason to believe that attorneys have any special expertise in those areas. Furthermore, those political issues are, at most, only tangentially related to the "improvement of justice".

There may be some narrow range of issues that the Bar may be uniquely qualified to speak on -- such as the regulation of the admissions and attorney discipline -- and with respect to which the state might, arguably, have some interest which would justify compelled support of the State Bar. That is not, however, the situation in this case. Here the state is claiming an interest in compelling attorneys to financially support a wide range of ideological positions of the State Bar.

Other courts that have looked at the type of broad justification for compelled financial support presented in *Keller* have rejected it. "It is difficult to conceive of an issue presented to the New Mexico Legislature which

cannot arguably be related to the administration of justice or improvement of the legal system. The standard is too broad." *Arrow* , 544 F. Supp. at 462. "One can hardly conceive of loftier goals in a democratic society than creating a strongly pluralistic society and improving the administration of justice. And yet broad statements such as these cannot form the basis for an infringement of First Amendment rights." *Schneider*, 682 F. Supp. at 683. *See Report of the Committee to Review the State Bar* 334 N.W.2d 544 (Wis. 1983). *But see In re Amendment to Integration of Florida Bar*, 439 So.2d 213, 218-214 (1983).

Nearly every court that has looked at the compelled support of integrated bars has held that objecting attorneys cannot be compelled to support political and ideological lobbying of state bar associations. *Arrow v. Dow*, 544 F. Supp. 458 (D.N.M. 1982); *Reynolds v. State Bar of Montana*, 660 P.2d 581 (Mont. 1983); *Schneider v. Colegio de Abogados de Puerto Rico*, 682 F. Supp. 674 (D.P.R. 1988); *Petition of Chapman*, 509 A.2d 753 (N.H. 1986); *Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986). *See Report of Committee to Review The State Bar*, 334 N.W.2d 544 (Wis. 1983); *but see In Re Amendment to Integration Rule of the Florida Bar*, 439 So.2d 213 (Fla. 1983); *Falk v. State Bar of Michigan* 342 N.W.2d 504 (Mich. 1983) [Falk II].

Furthermore, permitting the State Bar to force attorneys to financially support the Bar's political and ideological agenda would be in conflict with this Court's holding that an infringement by a compelling state interest can only be justified if it is "unrelated to the suppression of ideas." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Compelled support of a political and ideological agenda is directly related

to the suppression of ideas by taking attorneys' money and using it for political and ideological purposes.

In conclusion, the State of California has demonstrated no interest which justifies infringing upon the core area of attorneys' First Amendment rights.

C. The State Bar has the burden of demonstrating that it has a compelling state interest in forcing objecting attorneys to financially support any of the State Bar's activities.

The dissenting attorneys in this case objected to the political and ideological agenda of the California State Bar. However, the First Amendment is not limited to protecting political speech. As the court stated in *Abood*, "our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters -- to take a non-exhaustive list of labels -- is not entitled to full First Amendment protection." *Abood*, 431 U.S. at 231 and n.28.

There are expenditures of integrated bar associations, other than those specifically complained of in this case, that may also violate the First Amendment rights of dissenting attorneys. *Sorenson*, *supra*, at 75-80.

In other states attorneys have objected to other activities of integrated bar associations that impact upon their First Amendment rights. For instance, some of those activities include commercial programs, *Falk*, 305 N.W.2d at 218; publications *Schneider*, 682 F. Supp. at 681; and social activities *Hollar*, 857 F.2d at 170. Litigation can also be a form of ideological activity that implicates First Amendment rights. Even the California Bar's litigation in this case may be an infringement on the First Amendment rights of the plaintiffs. *See*

Reynolds v. State Bar of Montana, 660 P.2d 581 (Mont. 1983) (Shea, concurring). Other issues not yet litigated also have the potential for impacting upon the First Amendment. One example would be the imposition of a mandatory pro bono program by an integrated state bar.

This Court, due to a lack of factual record on the above list of activities, does not need to do the line drawing as to which, if any, of those activities can be justified. Nevertheless, this Court in its ruling should use a broad test to give guidance to the lower courts if line drawing becomes necessary in future cases.

That test has already been laid out by this Court in the context of the labor union cases. In those cases, this Court has held that the state may have an interest in compelling dues payments in order to require all employees to pay for collective bargaining and contract administration for the labor union which represents the bargaining unit. *Abood*, 431 U.S. at 220-224; *Ellis*, 466 at 447-448. However, there must be a compelling state interest to justify any additional impact upon the speech interests of the objecting non-union workers. This Court has interpreted that limitation to restrict unions to collecting compulsory dues only for those activities related their statutory duty of collective bargaining and contract administration and not for other union activities. *Abood*, 431 U.S. at 235-236; *Ellis*, 466 U.S. at 447-448; *Hudson*, 475 U.S. at 301-302.

How does that translate for purposes of analyzing an integrated state bar? Objecting attorneys, like non-union employees, cannot be compelled to support *any* activities which impose an additional burden on their speech interests, beyond the burden already imposed by the compelled association, unless the state has a com-

pelling interest which would justify that further infringement. Hence, the California State Bar is restricted from compelling financial support not only for the Bar's political and ideological activities, but the Bar is also restricted from compelling financial support for any activities unless the State has a compelling interest which would justify that infringement upon First Amendment rights. The California Bar has the burden of demonstrating that it has an interest that justifies compelling support for any activity that an attorney objects to -- whether that activity is commercial, artistic, social, or charitable.

D. Even if the state has a compelling interest in forcing attorneys to financially supporting a state bar, it must tailor the program so that it achieves the goal in a manner the least restrictive on the rights of objecting attorneys.

If California has no compelling interest in coercing attorneys to support the state bar, the state is prohibited from forcing membership and financial support.

However, if the state has an interest that justifies compulsory financial support for the bar, the government must tailor the forced collection of bar dues so that it achieves that end with means which are the least restrictive upon the rights of attorneys. Hence, the dues must be reduced for objecting attorneys to reflect only the attorneys' pro rata share of those limited bar expenditures for which there is a compelling interest in requiring the attorney to pay. Of course, if a state bar is not able to separate chargeable from non-chargeable

expenditures, it cannot collect anything from the objecting attorneys. *Schneider*, 682 F. Supp. at 688 n.14.[12]

Even if a state bar can separate those costs, there must be a procedure to insure that objecting attorneys are not charged for bar expenses beyond which they can be constitutionally compelled to pay. The dissenting and concurring opinion, in *Keller*, dealt briefly with the remedy required for the constitutional violation. That opinion held that the *Hudson* case provides the proper model for collection procedures. At least one other court has also stated that *Hudson* provides the proper model to analyze the collection procedures of an integrated bar. *Schneider*, 682 F. Supp. at 688.

This Court, in *Hudson*, held that as a prerequisite to the collection of fees by a government employer for payment to a labor union, the government and union must provide certain procedural protections to non-union employees in order to minimize the impact the collection will have on the employees' First Amendment rights. Those protections require a labor union to calculate its chargeable expenditures and have those expenditures verified by an independent audit. *Id.* at 307 n.18. The union must provide an advanced reduction of those items that are clearly non-chargeable and escrow of those items that are reasonably subject to dispute. *Id.* at 303-395. Finally, the bar must provide a method for objecting bar dues payers to be able to challenge the amount of the fees before an impartial decision maker. *Id.* at 307.

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[12] The State Bar should be required to return *all* dues taken from objecting attorneys in the past, since those dues were collected without providing any procedural protections to limit the collection to an amount that could be constitutionally charged to objecting attorneys.

So also, in order to tailor the collection of bar dues so as to minimize the impact upon attorneys' First Amendment rights, integrated state bars must be subject to the same procedures that unions are subject to in the collection of dues. Such procedures are necessary to prevent any infringement upon attorneys' First Amendment rights beyond that necessary to further a compelling state interest.

III. CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the decision of the California Supreme Court on the grounds that compelling financial support for the California State Bar's political and ideological agenda violates the Petitioners' rights to freedom of speech and association guaranteed by the First and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

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